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Supreme Court of the United States

OCTOBER TERM, 1949

No. 149

STATE OF OHIO on the relation of
JOSEPH M. GREISIGER, LLOYD PUSE,
CLIFFORD H. SMITH, et al.
Petitioners

v.

GRAND RAPIDS BOARD OF EDUCATION,
JOSEPH CULBERTSON, JOHN THOMAS, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Hayden C. Covington, on behalf of Joseph M. Greisiger, Lloyd Puse, Clifford H. Smith and others, seeks the issuance of a writ of certiorari to review the judgment of the Supreme Court of Ohio, deciding that no constitutional question was involved in this case.

OPINION BELOW

The Supreme Court of Ohio wrote no opinion and the judgment of that court is not reported. The judgment appears in the record. (2-3)[1] The Court of Appeals of Ohio wrote an opinion. It is unreported (Vol. 55, Court of Appeals Opinions, Sixth District, p. 71); it also appears in the record. (10-18) The Court of Common Pleas wrote an opinion. The unreported opinion appears in the record. (34-44)

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 15, 1950. (2-3) On the 11th day of May, 1950, this Court ordered the time for filing the petition for writ of certiorari extended to and including July 1, 1950. (229)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. § 1257 (3). See Note 2, *Martin* v. *Struthers,* 319 U. S. 141, 142.

QUESTION PRESENTED

Whether the construction of an Ohio statute allowing use of school auditoriums for religious meetings, so as to approve the denial of an application for a religious meeting at a proper time in the school on the ground that the religious assembly was prohibited by the doctrine of separation of church and state found in the state and federal constitutions, abridges the rights of petitioners to freedom of assembly, freedom of worship and freedom of speech, contrary to the First and Fourteenth Amendments

[1] Figures appearing herein within parentheses refer to pages of printed transcript of record.

to the United States Constitution, especially when other religious organizations are permitted to use the auditorium.

NO SUFFICIENT NON-FEDERAL QUESTION INVOLVED

The action was for mandamus. This was the only appropriate remedy. The writ of mandamus was, nevertheless, denied because it was held that the refusal to issue the permit by the school board was discretionary. The petitioners were therefore held to be without remedy.

The discretion of the school board does not prevent this Court from reviewing the unconstitutionality of the state action by the school board and the courts here complained of.

The ground of discretion is not a substantial or sufficient one. *Williams* v. *Kaiser,* 323 U. S. 471, 477-479. Mandamus and discretion were involved in *McCollum* v. *Board of Education,* 333 U. S. 203.

HOW QUESTION RAISED

By petition for writ of mandamus, it was contended that petitioners were being deprived of their rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. (24, 29, 30, 31)

The respondents contended that the use of the school by the petitioners was precluded by the doctrine of separation of church and state. (32-33)

The constitutional question was found to be properly raised by the trial court. (36-37)

The constitutional question was urged in the notices of appeal. (8-9, 19-20)

STATUTES AND REGULATIONS INVOLVED

STATUTES

The pertinent portions of the statutes follow:

"SECTION 4839. (Use of schoolhouses generally.)

"The board of education of a city, exempted village or local school district, in its discretion, may authorize the opening of such schoolhouses for any lawful purposes. But nothing herein shall authorize a board of education to rent or lease a schoolhouse when such rental or lease in any wise interferes with the public schools in such district, or for any purpose other than is authorized by law.

"SECTION 4839-1. (Schoolhouses available for educational and recreational purposes.)

"Upon application of any responsible organization, or of a group of at least seven citizens, all school grounds and schoolhouses, as well as all other buildings under the supervision and control of the state, or buildings maintained by taxation under the laws of Ohio, shall be available for use as social centers for the entertainment and education of the people, including the adult and youthful population, and for the discussion of all topics tending to the development of personal character and of civic welfare, and for religious exercises. Such occupation, however, should not seriously infringe upon the original and necessary uses of such properties. The public officials in charge of such buildings shall prescribe such rules and regulations

for their occupance and use as will secure a fair, reasonable and impartial use of the same.

"SECTION 4839-2. (Use of schoolhouses and grounds for public meetings and entertainments.)

"The board of education of any city, exempted village or local school district shall, upon request and the payment of a reasonable fee, subject to such regulation as may be adopted by such board, permit the use of any schoolhouse and rooms therein and the grounds and other property under its control, when not in actual use for school purposes, for any of the following purposes:

"1. For giving instructions in any branch of education, learning or the arts.

"2. For holding educational, religious, civic, social or recreational meetings and entertainments, and for such other purposes as may make for the welfare of the community. Such meetings and entertainments shall be non-exclusive and open to the general public.

"3. For public library purposes, as a station for a public library, or as reading rooms.

"4. For polling places, for holding elections and for the registration of voters, for holding grange or similar meetings.

"SECTION 4839-4. (Responsibility for damage; payment of actual expenses.)

"Any organization or group of citizens permitted to use the properties specified in Section 4839-1 of the General Code shall be responsible for any damage done them over and above the ordinary wear, and shall, if required, pay the actual expenses incurred for janitor service, light and heat." (General Code of Ohio)

Regulations

Before this action was instituted there was no written regulation. There was and now continues to be a custom not to allow religious organizations to use the school auditorium for religious meetings because such use produced discord in the community. (206-207)

After the action was instituted, a written regulation (not mentioning religious use) was promulgated which reads as follows:

"No. 1. At all times the auditorium is used for other than school purposes, an American flag at least three feet by five feet shall be displayed in said auditorium or suspended above the stage.

"No. 2. Any person or organization desiring to use the school building shall make application therefor to this Board made by at least seven citizens not less than thirty days prior to the date said school building is desired.

"No. 3. No continuing permit shall be granted for use of said school building and all permits so issued shall be for the use of said building for not more than two consecutive days and not more than one application will be considered from the same person, firm or organization at any one time.

"No. 4. No school building shall be permitted to be used for any unlawful purpose or for the advancement of any doctrines contrary to law.

"No. 5. All persons desiring to use the school building for non-school purposes shall pay as follows: For any damage done over and above ordinary wear and tear and they shall also pay the actual expenses incurred for janitor services, light, heat and equipment.

"No. 6. No application shall be granted to use any school building or any school grounds at any time when the same is in the actual use for school purposes or shall

such issuance in any way interfere with school in said school district.

"No. 7. No person, firm or organization shall use the school grounds or any school building for sale of any type of merchandise, commodity or printed matter until they have first secured a permit from the Clerk and shall have paid him a regulatory fee of $1.00, which shall entitle the holder to conduct such a sale or sales for a period of one year from the date thereof." (211-212)

STATEMENT

The East Unit of the Toledo Company of Jehovah's witnesses is a religious congregation existing according to law in Ohio. (56-57, 63) This congregation owns its own church or meeting place in Toledo. (46) The petitioners are the board of trustees for all the members of the congregation comprising 90 persons and the presiding minister and assistants who direct the missionary activity of Jehovah's witnesses in East Toledo and Wood County. (46-47, 63-64, 88, 101, 113, 122)

The congregation is composed of missionaries, (63-64) who preach publicly and from house to house. (47-48) The congregation holds public meetings at its meeting place as well as in all other available places of assembly in its missionary field, which includes Grand Rapids, Ohio. (47-48) The meetings are for the purpose of conducting lectures on Bible subjects and questions of public interest insofar as they relate to Bible prophecy. (57)

The policy of Jehovah's witnesses was to use school auditoriums and other meeting places in various parts of their missionary field for public meetings. (49) In 1947, petitioners wrote to the Department of Education of Ohio at Columbus inquiring whether school auditoriums were available for religious meetings. (67, 204-205) The Department of Education answered that school auditoriums of

Ohio were available for religious meetings when applied for by (1) any responsible organization or (2) a group of at least seven citizens. (205)

After receipt of the letter from the Department of Education, petitioners planned to obtain use of the high school auditorium in Grand Rapids. (67) A committee was sent by the congregation of 90 persons to Grand Rapids to engage the school auditorium. (51-64)

The committee applied to the superintendent of the schools who argued with them over their religious beliefs and added that they could not have the auditorium. (65-68) Upon their protest, the superintendent referred them to members of the school board. (66)

Later the committee visited members separately at their homes and places of business, and discussed with them the request for the use of the auditorium, but without satisfaction. (68-70, 101-103)

Later a letter was written to the board formally requesting use of the auditorium for four consecutive Sundays, stating: "These discourses will be free to the public, there will be no collection taken, or charge, or obligation on the part of any attending. These discourses or sermons are for educational purposes." (206)

On the third Monday in October, 1947, the committee met with the board to discuss the formal request. (71) They informed the board that they would pay for the cost of upkeep of the building while it was used by them and that they would pay the fees for lights and janitor service. (87, 107) They informed the board that if the specified Sundays were inconvenient then "any convenient time available and not in conflict with the school rules or anything going on there" would be satisfactory. (56, 104) Petitioners were willing to abide by all the rules of the school in respect to the use of the auditorium such as displaying the American flag, requirement that request be made by seven citizens, and not using the auditorium to advocate refusal

to vote, serve on a jury or comply with the selective service law. (58-59)

The board ruled that the school auditorium could not be used "for public meetings or any religious services". (72) The board was then shown the letter from the State Board of Education (205-206), and requested to follow the advice contained therein. In reply the board said that they did not comply with the advice from Columbus, but that "we are the law in Grand Rapids." (72, 104) On the trial, one of the members of the board admitted that the board did not pay any attention to the letter from the State Board of Education in respect to the use of the school by religious organizations. (144)

The board suggested that Jehovah's witnesses ought to make use of schools in the other districts, to which the committee replied that Jehovah's witnesses had completed their use of the auditoriums in other parts of the territory. (73)

The board members declared that it was their own belief that the law did not allow them to permit any particular religious organization to use the auditorium. It was said that the policy was to permit religious organizations to use it only in a joint meeting and then only when they could get together and agree not to disagree. (150, 154, 159-163)

The ruling of the board was not to allow Jehovah's witnesses to use the school auditorium because it would be contrary to the rule and policy of the board which forbade any one religious organization to use the auditorium. (150, 154, 159-163) The board had other reasons for denying Jehovah's witnesses the right to use the auditorium and that was that they did not constitute a "responsible organization" within the meaning of the statute. (154-158)

The petitioners admitted that the meetings on the school premises would constitute religious services and that delivery of the talks and listening to them at assemblies were

their way of worship. (96, 125) It was established that the proposed use during the time the school was not in operation was incidental and would not interfere with the school purpose and the school curriculum.

Various grounds were relied upon by the board as a basis for denial of the permit, which were either discussed at the meeting or admitted by the members upon the trial, such as failure and refusal to perform military service (135, 155, 166), refusal to salute the flag (136), failure to vote (135), belief in things not in accord with but in conflict with Americanism principles taught in the school. (140-141, 173-179, 181)

Another ground relied upon by the board for denial of the permit was that the use of the school by Jehovah's witnesses would cause the people of the community to talk and have an adverse feeling against the board and that it would cause dissension in the town. (146)

The board said that Grand Rapids did not want Jehovah's witnesses in the community and declared that Jehovah's witnesses are not worthy to be called citizens since they would not salute the flag and because of that are "not a responsible organization". (72, 105).

The board also contended that the use proposed by Jehovah's witnesses would conflict with the ordinary school use of the auditorium on account of play practice and basketball practice, but this was not substantiated by proof. (171-172, 182-184)

The committee attempted to prove to the board that Jehovah's witnesses are a responsible organization and had property in Toledo. (72-73) The board iterated its denial of the application. (73) The members of the committee were dismissed from the meeting. They left and went home. (104) The board wrote petitioners a formal letter of denial, stating: "Our board took action against it, as our school district is made up of various religious denominations and we have harmony in the community." (206-207)

In December, 1947, the congregation replied to the formal denial by registered letter. In this letter they made a more detailed formal application to use the auditorium. (207-208) In this letter the congregation said, among other things: "The purpose of these meetings are strictly educational and non-sectarian. The meetings shall be non-exclusive and open to the general public. No admission charge will be made at any of these meetings and no collections will be solicited. [¶] When we were at your board meeting it was mentioned that Jehovah's witnesses were not a responsible organization. For your information we have had the use of the 'Public Auditorium', Cleveland, Ohio in 1946; the 'Arena' at St. Louis in 1941; 'Madison Square Garden', at New York in 1939; and 'Convention Hall' at Philadelphia, Penn. in November, 1947. Locally we have had 'Fremont Ross High School', Fremont, Ohio (June 15, 1947), and December 19-21, 1947, we will have an assembly at 'Scott High School', 2400 Collingwood Blvd., Toledo, Ohio. [¶] . . . These Bible lectures tends to the development of personal character and to combat the national scourge of juvenile delinquency. . . . [¶] Jehovah's witnesses will be glad to pay the actual expense incurred for janitor service, heat and light in the use of the auditorium." (207-208) No formal written denial or reply to this letter was made. (77) Following the mailing of the registered letter to the board a hearing was had before the board at Grand Rapids on the third Monday of December, 1947. (74-75, 104) The board ruled that it was determined to defend its denial in the courts and would "even go to the Supreme Court". (75)

Almost a year passed without any written word being received from the board. The committee, representing the congregation, then made another application by letter dated November 6, 1948. (77) They also again visited the members of the board at their respective homes or places of business with no good result. (78-80) On November 17, 1948, the school board responded to the letter of November 6,

1948 as follows: "Your request for the use of the Grand Rapids Public School for the four Sundays commencing January 8, 1949 has been rejected." (210)

In December, 1948, another formal application was written to the board, requesting four specified successive Sundays commencing January 9, 1949, "or anytime thereafter as it can be conveniently arranged". (210) This letter was delivered personally to the clerk of the board. (107) No formal reply was ever made to this last application.

The petition for mandamus was filed December 20, 1948. (20, 23) The alternative writ issued on the same day. (20, 21) On that same day the board held a meeting for the purpose of considering the mandamus action and passed a resolution declaring that it "refuses the use of the school building to the relators of the said mandamus mentioned above". (213) On January 3, 1949, the school board met and adopted a resolution to resist the mandamus suit brought by Jehovah's witnesses. (211) On February 3, 1949, the respondents filed their answer. (20, 32-34)

The case was called for trial and evidence received on February 7, 8 and 9, 1949. (45) Upon the trial the above material facts were developed. The court allowed the respondents to roam into an unlimited field of hearsay and immateriality. Following the institution of the mandamus proceedings certain citizens in the community circulated various petitions among the residents of the community protesting to the school board against the use of the auditorium by Jehovah's witnesses. (127-132) The petitions were circulated and presented to the board after the board was served with the alternative writ of mandamus and shortly before the respondents filed their answer on February 1, 1949. (132)

Objection was made to the receipt of the petitions into evidence because they were the rankest type of hearsay and constituted an ex parte deposition of the citizens of the community taken without notice to petitioners after

the action was instituted. (128-129) The petitions were nevertheless received into evidence. (128, 130)

Certain resolutions of protest against the use of the school auditorium by Jehovah's witnesses were passed by local organizations of Grand Rapids, such as the Exchange Club (149), the American Legion and the American Legion Auxiliary, the Grange organization and the Parent-Teachers Association. (169). Each was dated subsequent to the date the action was instituted. (213-217) All of these protests were received into evidence over the objections of petitioners. (213-217)

At the close of petitioners' case the respondents moved to dismiss. The motion was denied. (127) At the close of the case the court took the matter under advisement and reserved decision. (203)

On April 1, 1949, the court denied the writ of mandamus. (22) In the opinion the court reviewed the history of the litigation (34-35), briefly touched upon the law of mandamus (36), declared that it was necessary to determine whether there was an unconstitutional denial of the rights of petitioners (37), reviewed the facts (37-39), adverted to the arguments and briefs (39-40), referred to the Ohio General Code opening the school buildings for civic center purposes (40-41), discussed various points of law (41-43) and decided that the school board had not abused its discretion in denying the use of the auditorium to petitioners. (43-44)

The case was duly appealed to the Court of Appeals of Ohio. (19-20) On December 5, 1949, the Court of Appeals affirmed the judgment of the trial court. (10) The opinion referred to the pleadings. (10, 12) The court stated that the question to be decided was whether the school board had discretion to deny the application and if so whether there would be an abuse of discretion. (13) The opinion relied upon the dissentient beliefs and unorthodox practices of Jehovah's witnesses as justification for the denial of the

application for the permit. (13) It reviewed the law af mandamus and concluded that discretion is granted to the board. (14-16) It found that Jehovah's witnesses are not a responsible organization because of their beliefs and practices. (15-17) It approved the receipt into evidence of the hearsay petitions and ex parte depositions. (17-18) It held that the construction of the Ohio law was "not repugnant to the state or federal constitutions" and that the construction did not "unreasonably interfere with the constitutional rights of appellants". (18)

The case was duly appealed as of right to the Supreme Court of Ohio. (8) Respondents moved to dismiss the appeal. (7) The Supreme Court dismissed the appeal on the ground that there was "no debatable question" involved. (2-3) [2]

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Ohio and the Court of Appeals of Ohio erred

(1) In holding that the statute, as construed and applied, did not abridge petitioners' rights of freedom of speech, freedom of assembly and freedom of worship, contrary to the First and Fourteenth Amendments to the United States Constitution.

(2) In holding that respondents, acting for the state, could deny petitioners' constitutional rights under the guise of exercise of discretion by an executive board.

(3) In holding that the courts could not interfere with the denial of constitutional rights by an executive board because there was no abuse of discretion.

(4) In holding that Jehovah's witnesses are not a responsible organization.

(5) In failing to hold that the denial to petitioners of

[2] See Martin v. Struthers, 319 U. S. 141, 142, note 2.

the application for the use of the school auditorium was arbitrary, capricious, an abuse of discretion and an abridgment of the rights of freedom of speech, freedom of assembly and freedom of worship guaranteed by the First and Fourteenth Amendments to the United States Constitution.

(6) In failing to hold to be erroneous the construction, placed by respondents upon the state and federal constitutions which prohibit use of state funds for sectarian purposes, that the incidental use of school buildings by religious organizations as places of assembly is forbidden.

(7) In affirming the judgment of the Court of Common Pleas of Wood County, Ohio.

REASONS RELIED ON FOR GRANTING THE WRIT

I

The decisions of the courts below disrupt and disorganize completely throughout the United States the uniform practice of using school auditoriums for civic center purposes at times when not used by the schools. For over one hundred years it has been the general practice, with or without legislative authority, to permit school buildings, when not being used for educational purposes, to be used as places of assembly for the discussion of community, state and national problems.

Included among such users, especially in the rural districts, have been and are the religious organizations. In many communities there are no buildings where religious assemblies may be had unless the school is made available. Necessity, practice, usage, custom and statute throughout this country have made available the school auditoriums for religious gatherings when the schools are not using them. On the pretext that such use constitutes a violation of the principle of separation of church and state the respondents have upset, flouted and denied this general cus-

tom and need which have never been constitutionally doubted. This denial has been on the theory that the use of the school auditorium by religious groups constitutes appropriation of public property for sectarian purposes contrary to the prohibition of such found in the state and federal constitutions.

The courts of Ohio have refused to act or disturb this erroneous administrative interpretation of the Constitution on the ground that it was within the discretion of the administrative agency, acting for the state through the respondents, to interpret the Constitution. They have said that the school board is the Supreme Court of the United States as far as a determination of whether the Constitution allows the use of school auditoriums for religious gatherings is concerned.

The effect of the decisions of the courts below and of the administrative agency represented by the respondents is far reaching. The constitutionality of the policy of forty-eight states' allowing school buildings to be used by religious organizations is imperiled. Thousands of communities and hundreds of thousands of people will be affected if the erroneous doctrine approved by the state courts below is not reviewed by this Court and determined.

The principle, if not reviewed by this Court, will give rise to further discriminations and denials. If a religious organization can be denied its right to use a school building because it is not popular with the people of the local community, then what is to prevent political campaigners, who do not reside in a community, or unpopular campaigners, from being denied the use of school buildings for purposes of political assembly?

Even more far-reaching devastation is inherent in the state approval of the doctrine that separation of church and state forbids the incidental use of school property by a religious organization. If this principle is sound, then tax exemption to churches and religious organizations in

every community of the nation by state constitutions is imperiled. If the First Amendment forbids to religious organizations the incidental use of school property for holding religious meetings (when the school is not being used for school purposes) by force of the same reason it also denies authority to the states in their constitutions and the Congress in the District of Columbia to grant tax exemption to religious organizations and churches.

In both cases it is the use of state funds. In the case of tax exemption to religious organizations the use of state funds is greater and bears more heavily upon the people than does the incidental use of a school auditorium as a place of assembly for worship.

Should the principle approved by the courts below and the executive board represented by respondents be sanctioned by this Court, then an opening wedge has been driven to split asunder and upset completely the holdings of this Court that the streets and parks, which are publicly maintained by the state, can be used for public preaching.

This Court has held in many cases that the street preaching of Jehovah's witnesses by distribution of literature upon public property is protected by the freedom of religion provision of the First Amendment. The principle advocated by the respondents and approved by the courts below, if extended, which it must be if accepted, would forbid the use of public streets and parks for the distribution of religious literature and preaching by ministers and missionaries, which this Court has held to be constitutional.

The approval of the principle that separation of church and state precludes the incidental use of public property by a religious organization to preach presents a national anomaly. It has produced a grotesque inconsistency that affects the rights and liberties of all of the people of the nation. Should that principle be allowed to stand, the people of

the nation will not know what is protected and what is prohibited by the First Amendment.

The guarantee of freedom of religion in the First Amendment needs to be defined so that the doctrine of separation of church and state may have its boundaries fixed. That has not yet been done by this Court. The existing inconsistency is confusing. The ambiguity in the First Amendment, as it has been interpreted and construed by the respondents and the courts below, should be terminated through an immediate clarification by this Court.

This case is now ripe for decision. It is not moot. See *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498; *Leonard & Leonard* v. *Earle*, 279 U. S. 392; *Federal Jurisdiction to Decide Moot Cases*, 94 U. of Pa. L. Rev. 125-147. Nor is the case "too moribund for adjudication". *Darr* v. *Burford*, 70 S. Ct. 587, 602 (Mr. Justice Frankfurter, dissenting). This case is important beyond its particular facts and parties. A much larger class of people is involved. If the doctrine of separation of church and state keeps Jehovah's witnesses out of the school buildings, *a fortiori* the doctrine closes the door to all religious organizations. Not only are Jehovah's witnesses and the respondents concerned, but all religious organizations and school boards throughout the nation are concerned.

There is presently existing a nation-wide controversy between the school boards of many states of the nation and many religious organizations over whether the First Amendment (as claimed by the respondents) makes mandatory the denial of the use of school auditoriums to religious organizations under civic center acts or custom and usage permit school buildings to be used as places of assembly. No good will come to the people, states or the nation by awaiting "the perspective of time", because time will not "soon bury the question". *Darr* v. *Burford*, 70 S. Ct. 587, 602 (Mr. Justice Frankfurter, dissenting). Delay will merely exacerbate the epidemic until it becomes a

national scourge ultimately requiring a resurrection of the dead before the Court.

II

The holdings by the Supreme Court of Ohio, the Court of Appeals of Ohio and the Common Pleas Court are in conflict with *Hannegan* v. *Esquire*, 327 U. S. 146, holding that a privilege, as distinguished from a right, may not be taken away from a person on arbitrary and capricious grounds.

Sections 4839-1 and 4839-2 of the Ohio General Code grant the privilege to religious organizations to use school buildings for places of assembly, when applied for by a responsible organization or by seven citizens. The application was made by a congregation of 90 persons acting through a committee.

It should be noted that Section 4839-1 of the Ohio General Code does not specify or require a *written* application. The statute uses the term "upon application". Since it was not required that the application be in writing, there is nothing to compel the written application by the committee to be signed by seven citizens. The committee was acting for the East Unit of Toledo Company of Jehovah's witnesses, and the Watch Tower Bible and Tract Society.

The evidence showed that the East Unit was composed of 90 persons residing in Toledo. These persons, it must be assumed, are citizens of Ohio. Inasmuch as the evidence shows that the applications were made by a committee in behalf of 90 persons residing in Toledo, it must be concluded, when the statute is given a reasonable and fair interpretation, that the application was made in behalf of seven citizens within the meaning of Section 4839-1 of the Ohio General Code.

The effort of respondents to defeat the application on the ground that it was not signed by seven citizens failed

because the court of appeals held that the application need not be in writing. (16)

Even assuming, for the purpose of argument, that the applications were not made by seven citizens, they were nevertheless made by and in behalf of "a responsible organization" within the fair meaning of that term as used in Section 4839-1 of the Ohio General Code. The evidence showed that the Toledo East Unit of Jehovah's witnesses constitutes a "responsible" organization. From this evidence it must appear that the applications were made by a financially responsible organization. Also the applications were made by a responsible organization when that term is used in its broader or proper sense.

While it is true that Jehovah's witnesses may hold views that are unorthodox or strange and even repulsive to some people, they, nevertheless, constitute a responsible organization. There is no requirement of orthodoxy in morals or belief in determining what is "responsible".

Therefore, inasmuch as the Toledo East Unit of Jehovah's witnesses is a religious organization and a part of a large international organization, when the word "responsible" is given its broader sense, it appears that the petitioners are a responsible organization.

The undisputed evidence before both the board of education and the courts below shows that the petitioners intended to use the auditorium of the school for "religious exercises" and "for holding . . . religious . . . meetings . . . and for such other purposes as may make for the welfare of the community." (Sections 4839-1, 4839-2, General Code of Ohio) The undisputed evidence showed that the " . . . meetings . . . shall be non-exclusive and open to the general public." (Section 4839-2)

Therefore the petitioners respectfully submit that the applications, both oral and written, were made in the form and in the manner required by law, which places upon the

respondents the performance of a duty to issue the permit which was specifically enjoined by law.

The holdings of the courts below that petitioners do not constitute a responsible organization because of their dissentient beliefs, unorthodox practices, conscientious objection to military service, refusal to salute the flag and to serve on juries or vote, (none of which, according to the record, are discussed at public meetings in school auditoriums) should be rejected by the Court because the right of Jehovah's witnesses to hold such opinions and engage in such practices has been approved by decisions of this and other courts.

This Court has held that dissentient beliefs and practices of, and the assault by, Jehovah's witnesses upon the orthodox religions were not grounds for denial of liberty guaranteed in the Bill of Rights. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115-116; *Cantwell* v. *Connecticut,* 310 U. S. 296, 310.

The right to have conscientious objections to the performance of military service is no basis for the penalty here imposed. See Section 5 (g) of Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 305); Section 6 (j) of Selective Service Act of 1948 (62 Stat. 609, 50 U. S. C. App. 456). Even the privileges of citizenship may not be denied because of possession of conscientious objection to military service. *Girouard* v. *United States,* 328 U. S. 61.

Jehovah's witnesses may not be denied the privilege of receiving free state education because of their refusal to salute the flag. *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624.

In *United States* v. *Hillyard,* 52 F. Supp. 612 (E. D. Wash.), the right to be exempt from jury duty by one of Jehovah's witnesses was declared by Judge Schwellenbach.

The position here taken, that the decisions of the courts below and the rule of the respondents, as representatives

of the school board, are in conflict with the holding of the Court in *Hannegan* v. *Esquire* (327 U. S. 146), is supported by the Supreme Court of California in *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885. In that case the action was for mandamus to compel a school board to grant permission to use a school auditorium without condition that the petitioners sign a loyalty oath. Petitioners refused to take the oath. They contended that the oath statute was void on its face because it abridged the Constitutions of California and of the United States.

The Supreme Court of California held that the action of the school board in refusing the permit because of the petitioners' refusal to sign the loyalty oath was an abridgment of the right of freedom of speech and assembly, contrary to the First and Fourteenth Amendments. The court, among other things, said:

"The state is under no duty to make school buildings available for public meetings. (See 86 A.L.R. 1195, 47 Am. Jur. 344) If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. (*Missouri* ex rel. *Gaines* v. *Canada*, 305 U. S. 337, 349; *Marsh* v. *Alabama*, 326 U. S. 501.) Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property. (*Frost* v. *Railroad Commission of California*, 271 U. S. 583, 594; *Hague* v. *CIO*, 307 U. S. 496, 515; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110-111; . . .

"Since the state cannot compel 'subversive elements' directly to renounce their convictions and affiliations, it cannot make such a renunciation a condition of receiving the privilege of free assembly in a school building. . . .

"There is a parallel between the privilege in question and the privilege of using the mails at less than cost. In

Hannegan v. *Esquire*, 327 U. S. 146, Mr. Justice Douglas speaking for the court declared: 'But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever.' See the dissents of M. Justice Brandeis and Mr. Justice Holmes in *United States* ex rel. *Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437, 438."

The decision in *Danskin* v. *San Diego Unified School District*, 28 Cal. 2d 536, 171 P. 2d 885, is so closely in point and so strongly supports the position taken here by petitioners that the Court is referred to the opinion and requested to read the marked parts in the printed slip copy of that opinion accompanying this petition. See the marked parts on pages 1, 2, 3, 5, 9 and 10 of the printed slip copy of opinion.

III

The decisions below fail to give proper effect to applicable decisions of this Court and are out of harmony with principles announced in decisions of this Court involving the doctrine of separation of church and state that is implicit in the First Amendment to the Constitution.

It is well settled that the use of school auditoriums (when not in use for school purposes) by religious organizations for religious services and assemblies for worship, does not constitute a sectarian use in violation of the doctrine of separation of church and state. The greater weight of authority holds that the religious use of the school auditoriums in such circumstances is so slight and inconsequential as not to violate the doctrine of separation of church and state. See *Nichols* v. *School Directors* (1879) 93 Ill. 61; *School Directors* v. *Toll* (1909) 149 Ill. App. 541; *Hurd* v. *Walters* (1874) 48 Ind. 148; *Baggerly* v. *Lee* (1905) 37 Ind. App. 139, 73 N. E. 921; *Townsend* v. *Hagan* (1872) 35 Iowa 194; *Davis* v. *Boget* (1878) 50 Iowa 11; *Gibbert* v.

Dilley (1914) 95 Neb. 527, 145 N. W. 999; *Greenbanks* v. *Bantwell* (1870) 43 Vt. 207; *Lagow* v. *Hill* (1909) 238 Ill. 428, 87 N. E. 369.

Other state decisions relating to this problem are interestingly collated and discussed in 5 A. L. R. 886, 7 A. L. R. 791, 52 A. L. R. 249, 86 A. L. R. 1181, and 161 A. L. R. 1308.

The position here taken by petitioners is supported by a decision on May 29, 1948, by the Court of Appeals of the Republic of the Philippines in the case of *The People of the Philippines* v. *Florencio Fernandez, et al.*, reported in 1948 Lawyers Journal 295. That case involved the use of a public building by Jehovah's witnesses. That use was sustained and held not to be a violation of the Constitution forbidding the use of public money or property for sectarian and religious purposes.

A printed slip copy of the opinion is submitted with this petition. The marked parts thereof are referred to the Court for its consideration along with this petition.

The logic, reasoning and analogy of the above decisions which are squarely in point so far as the use of the school auditorium at Grand Rapids, Ohio, by petitioners is concerned, bring them squarely within the holding of *Everson* v. *Board of Education of Ewing Township*, 330 U. S. 1. The holdings of the courts below are out of harmony with and have failed to give proper effect to *Everson* v. *Board of Education of Ewing Township* (330 U. S. 1) as to the scope of the doctrine of separation of church and state that is to be found implicitly in the First Amendment.

Reliance has been placed by respondents upon *McCollum* v. *Board of Education*, 333 U. S. 203. This decision is not authority against petitioners. The principle of the *McCollum* case is limited to a constitutional prohibition of the use of school time and the course of instruction given the children through the compulsory education law to teach

religious doctrines, creeds and principles. *McCollum* v. *Board of Education,* 333 U. S. 203, 205, 209.

The issue in the *McCollum* case was confined to the precise problem of utilization of the compulsory education process and school system for religious training. It was not based upon the proposition that public property cannot be used for the exercise of constitutional rights by religious bodies. If this Court so held it would have so stated explicitly. If a public school building dedicated by law and regulation to community purposes by the directors of a board of education (making it like a public park) cannot be so used by a religious group, then by force of the same reason a public street or a public park could be kept back from use by a religious group. The doctrine of separation of church and state ordained in the First Amendment must not be distorted so as to itself become an abridgment of liberty. It would result in just that if the construction of the Constitution by the respondents is not corrected here.

The doctrine must not be stretched beyond the breaking point. Since the public streets and public parks cannot be withheld from religious organizations for exercise of their constitutional rights of free speech (*Hague* v. *C. I. O.,* 307 U. S. 496; *Schneider* v. *New Jersey,* 308 U. S. 147; *Jamison* v. *Texas,* 318 U. S. 413; *Marsh* v. *Alabama,* 326 U. S. 501) then public schools that have been opened for community meeting purposes by the legislature of Ohio may not be denied to petitioners for such purposes.

The petitioners bring themselves within the doctrine of *Everson* v. *Board of Education of Ewing Township,* 330 U. S. 1, and they are not precluded from relief that they were seeking by the holding of this Court in *McCollum* v. *Board of Education,* 333 U. S. 203.

IV

The decisions below fail to give proper effect to and are out of harmony with applicable decisions of this Court as to equal justice under the law.

It is well settled that discrimination is a violation of the Constitution. The permitting of harmonious joint religious groups to use the auditorium in question for religious services, while denying such use to Jehovah's witnesses, constitutes a denial of the equal protection of the laws required by the Fourteenth Amendment.

This discrimination by the administrative agency and the approval thereof by the courts below are out of harmony with and are in conflict with *Skinner* v. *Oklahoma*, 316 U. S. 535, and *Yick Wo* v. *Hopkins*, 118 U. S. 356.

It is petitioners' privilege to make use of the school building. It is respondents' unequivocal duty to make the school building available to all classes of religious groups. It must be remembered that the legislature of Ohio did not intend to confer arbitrary, unfair or capricious power on the board of education.

V

The decisions below fail to give proper effect to and are out of harmony with the applicable decisions of this Court as to the right to make use of appropriate public places in the exercise of civil liberties guaranteed by the First and Fourteenth Amendments.

The courts below approved the state administrative determination by the respondents that there were other appropriate and available public places in Grand Rapids where meetings could be held.

The evidence shows that there is a town hall in Grand Rapids. Also it appears that there is a park owned by the village on which are situated a number of picnic houses. It is contended that Jehovah's witnesses have no right to

make use of the school auditorium as long as these places are available.

This is a very specious contention. If this were the true principle of law, then every person who is also approached for permission to use an auditorium in a school district would refuse such permission on the ground that there are other places available. Thus the applicant would be on a merry-go-round and an endless chase of hide-and-seek that would wind up in total frustration of his desire to hold public meetings in the school district.

If a public park or a public building is available it can not be denied on the ground that there are other appropriate places that may be used. This type of reasoning has been rejected by this Court in *Schneider* v. *New Jersey*, 308 U. S. 147. There, at page 162, the Court said: "But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

VI

The decisions below fail to give proper effect to applicable decisions of this Court as to the duty of state courts to grant relief protecting the exercise of civil liberties.

This Court has said that "Upon the state courts equally with the courts of the Union rests the obligation to guard and enforce every right secured by that Constitution. In view of the dominant requirement of the Fourteenth Amendment we are not at liberty to assume that the State has denied to its courts jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose." *Mooney* v. *Holohan*, 294 U. S. 103, 113. See also *Robb* v. *Connolly*, 111 U. S. 624, 637.

The petitioners have a constitutional right to use the

school auditorium because it has been opened by statute. The deprivation of the right is a denial of freedom of worship and assembly contrary to the equal protection clause of the Fourteenth Amendment. Where a right guaranteed by the Constitution has been violated, and there is no other remedy to redress the deprivation except by mandamus, the writ must issue. *United District Heating, Inc.* v. *State Office Building Commission*, 124 Ohio St. 413, 415-416.

It was said in *Weaver* v. *Ohio State University*, 126 Ohio St. 290, 185 N. E. 196, that where there was a violation of a constitutional right and no other remedy was available, the writ of mandamus must issue. There is no legal remedy outside of the writ of mandamus available to petitioners. *First Nat'l Bank* v. *Botkins*, 141 Ohio St. 437, 250 O. O. 576, 48 N. E. 2d 865.

The Constitution of Ohio and the Constitution of the United States guarantee freedom of speech and peaceable assembly. (*Hague* v. *C. I. O.*, 307 U. S. 496; see also 21 MINN. L. REV. 744) The right of assembly cannot be effectively expressed without the use of public auditoriums and other meeting places. It was for the purpose of enabling the public schools to have a part in increasing such places of assembly that the legislature of Ohio passed the law which authorized the members of the boards of education to permit school buildings to be used as places of assembly. Prior to the enactment of the sections of the General Code of Ohio authorizing the use of school buildings for public meeting purposes there was no duty on the part of the school board or board of education to permit the use of school property for uses other than school purposes. *Weir* v. *Day* (1878) 35 Ohio St. 143.

In *Homan* v. *Board of Embalmers and Funeral Directors*, 135 Ohio St. 321, the act provided for the licensing of embalmers. The rule of the board required all applicants for renewal of licenses who, prior to the enactment had

not matriculated in an accredited school of embalming, to undergo a two-year apprenticeship in embalming and show proof of having handled in such apprenticeship a certain number of embalmed bodies. They required this of renewals which was the requirement for students and original applicants for embalming license in the General Code. The mandamus was held properly issued.

In order to constitute an abuse of discretion, it must appear that it was exercised on grounds, or for reasons, clearly untenable, to an extent clearly unreasonable. *Mutual Home and Savings Assn.* v. *Merion*, 67 Ohio App. 439, 37 N. E. 2d 109, 119.

The case of *Bigelow* v. *Spiegel*, 22 O. C. C. N. S. 337, 43 O. C. C. 595, is directly in point. It involved the refusal to issue a permit to hold an assembly and parade on the streets of Cincinnati, Ohio. The mandamus was prayed for to compel the issuance of the permit. The court held that the power of the city was to regulate and that a refusal must be reasonable and not arbitrary. It was shown that the refusal was not based on the exercise of discretion but was arbitrary, whimsical, actuated by bias and prejudice toward the relator and his cause and that there was no basis for fear of disturbance or public inconvenience from holding the meeting. It was shown that permits were freely and frequently granted to other persons and organizations. Such evidence, it was held, constituted grounds for the issuance of the writ of mandamus.

It is well settled that relief by mandamus will be granted against administrative officials when their duty is plainly described so as to be free from doubt and equivalent to a positive command. *Girard Trust Co.* v. *Helvering*, 301 U. S. 540, 543; *Wilbur* v. *United States*, 281 U. S. 206, 218-219; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577.

The "supposed" discretion of respondents was exercised to an end or purpose not justified by the law and clearly against the decisions of this Court, which define the fun-

damental law of the land, and clearly establish an arbitrary and capricious abuse of discretion. This Court commanded the issuance of a writ of mandamus against the Board of Education in the case of *McCollum* v. *Board of Education,* 333 U. S. 203. In that case the Court reversed the holdings of the Illinois court and remanded the case for further proceedings consistent with this Court's opinion. 333 U. S. at page 212.

CONCLUSION

For the foregoing reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated, June 24, 1950

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

October Term, 1950

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Petitioners,

vs.

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I

HISTORY OF THE CASE

This case was commenced in the Court of Common Pleas of Wood County, Ohio, on December 20, 1948, by petitioners filing an action in mandamus against the Grand Rapids Board of Education, respondents herein, to require them to permit the use of the school building of Grand Rapids, Ohio, for use as a place of worship by petitioners. The case was decided by the Honorable Earl K. Solether,

Judge of the Court of Common Pleas, in favor of respondents on April 1, 1949. The Court of Common Pleas opinion appeared at Page 34 of the record and being based upon the fact that petitioners were bringing an action in mandamus to control the discretion of an administrative body, which is contrary to the statutory and common law of Ohio.

Thereafter the Northwestern Ohio Superintendents' Association, composed of some eighty superintendents of schools in Northwestern Ohio, entered said case as *Amicus Curiae* and filed their brief opposing such use of this school building.

On November 2, 1949, the Court of Appeals of Wood County, Ohio, unanimously decided that petitioners were not entitled to use the school building as aforesaid, and they likewise based their opinion upon the fact that mandamus could not be used to control the discretionary action of an administrative board. This opinion appears in the record at Page 10.

On February 15, 1950, the Supreme Court of Ohio unanimously decided that petitioners' appeal as of right should be dismissed for the reason that no debatable constitutional question was involved.

Thereafter, petitioners petitioned this Court for a *writ of certiorari.*

II

JURISDICTION

This Court has no jurisdiction over this matter as the case has previously been decided by three Courts of Ohio upon a purely procedural ground which did not involve any federal question. It is true that the case did involve a federal question, however, the deciding of this question not being necessary to a decision of the case, this Court has no jurisdiction. The rule has repeatedly been stated by this Court to be that adjudication of the federal question involved must be necessary to the judgment if jurisdiction is to be taken by this Court, *Wilson vs. Cook*, 1946, 327 U. S. 473, 66 S. Ct. 663, 90 L. Ed. 793 at 799.

In *Cuyahoga River Power Co. vs. Northern Realty Co.*, 1917, 244 U. S. 300 at 303 and 304, the above rule was applied where the Supreme Court of Ohio had found "no debatable constitutional question exists" as appears in the instant case, and the case came to this Court from the Supreme Court of Ohio and the appeal was dismissed for want of jurisdiction where a decision of the case could be had and had been had without involving the federal question.

This Court has also held that where the petitioners have pursued the wrong remedy, or failed to pursue a remedy granted under the State statutes, the appeal should be dismissed and *certiorari* denied, *Copperweld Steel Company vs. Industrial Commission of Ohio*, 1945, 324 U. S. 780, 89 L. Ed. 1363, 65 S. Ct. 1006, 143 O. S. 591, 56 N. E. 2d 154.

III

EVIDENCE AND FACTS

From September 1, 1947, through December 4, 1948, members Jehovah's Witnesses and affiliated with its East Toledo Company made written and oral demands upon the respondents for leave and permission to use the Grand Rapids school auditorium as a place of worship and for religious and missionary work and meetings (see Exhibits A through J, R. 204 to 213). These requests were all denied by the respondent board orally or in writing.

The requests to use the building were made by Charles L. Hahn, Richard Krebs, Jr., Leonard H. Rieth, W. E. Wienekamp, Fred Buehler and Lloyd Puse. None of the written requests was ever signed by all of these six persons, nor at any time that oral requests made were all six persons present; therefore a demand was never made by seven responsible citizens for the use of the building in accordance with Section 4839-1 OGC.

Furthermore, none of the above persons resided within twenty miles of the village of Grand Rapids, and the Jehovah Witness Church that they attended was approximately thirty miles from Grand Rapids. In other words, none of the persons requesting the use of the auditorium, or the church with which they were affiliated, were citizens or residents of the community of Grand Rapids, Grand Rapids Township, or the Grand Rapids school district, nor was the institution in which they were interested situated in said area.

There are no Jehovah's Witnesses in the Grand Rapids school district. Many of petitioners' witnesses knew of no person in the school district who was a member of their sect or who even manifested an interest therein so as to

qualify as a person of good will. (R. 125, 24, 68, 103, unless indicated to the contrary figures appearing hereafter refer to pages of the Bill of Exceptions). Several of the Witnesses remembered one person in Grand Rapids, who was a good will person, but who was sick at the time of the requests and trial and was not even in the village any longer (R. 60, 65, 89, 110, 59).

The evidence clearly shows that the denial of the board to permit the use of its auditorium as a place of worship by Jehovah's Witnesses caused no hardship upon any member of the school district nor did it deprive or hinder in any manner any person in said district from worshipping as a Jehovah Witness. To the contrary, the evidence clearly shows that this case arises out of a deliberate plan of Jehovah's Witnesses from communities far removed from Grand Rapids to inject themselves into a situation where they were not wanted, and knowing that they were not wanted, to foment a lawsuit which would arise in the extensive radio and newspaper publicity secured by them, which is a direct part of their religious work. *Collier's Magazine, November 2, 1946, page 12, Readers' Digest, January '47, "Jehovah's Traveling Salesmen."* These articles clearly show that an integral part of the Jehovah Witness movement is an extensive campaign of litigation coupled with the attendant publicity growing therefrom.

During the extensive program of petitioners to secure permission to use the building no effort was made by them to secure the use of the many other fine public buildings in Grand Rapids, which would have been open to them and suitable to their use (R. 55, 90 to 92). Petitioners were unable to find the mayor of the village, Mr. Borough. However, they were in his home, in his presence talking to his wife, who was clerk of the board and yet they made no demand of the mayor to use the town hall (71, 88, 98, 232). They were also unable to find the village clerk, Mr. Manore,

a prominent citizen of Grand Rapids and an assistant cashier of its bank, who would have or could have given them permission to use the town hall (R. 190 to 194), nor could they find Mr. George Tonges, the caretaker of the shelter house of Mary Thurstin Park in the Village of Grand Rapids, which would have been suitable for Jehovah's Witnesses' purposes and which has been open to the public and to other religious groups, and of course no demand for the use of such building was made upon Mr. Tonges (R. 187, *et seq.*). There are many buildings in this school district which are available and suitable to the need of Jehovah's Witnesses other than the school auditorium. The shelter house in Mary J. Thurstin Park (R. 187) seats one hundred people and has a fireplace. The room used by the Township Trustees in the town hall (R. 190) seats fifty people and is a public building, and in the same building there is an auditorium with stage and rostrum which will seat three hundred to four hundred people; both of these rooms are heated (R. 189-190), Otsego Park has a shelter house which will seat approximately one hundred people, has two fireplaces, terrazzo floors, and is a very beautiful building (R. 192 and 193). The Masonic dining room in the Grand Rapids Masonic Temple will seat three hundred people and is separate and apart from the lodge hall (R. 194). The Odd Fellows Hall will seat two hundred fifty and has been open to the public for dances, etc., (R. 194). Vacant store rooms also existed in Grand Rapids at the time so that these could have been used by the Witnesses. The fact that no request was ever made for any of these buildings and no honest, sincere or concerted effort made to find the people in charge of said buildings shows that it was the well conceived plan of petitioners to make an issue out of the refusal of the school auditorium to be followed by lawsuit and great publicity. Petitioners did not really and truly desire the use of the school auditorium, their chief

goal was the lawsuit, radio broadcasts and newspaper articles. This is especially true when we find in the record that the park, shelter houses, and town hall have been repeatedly used by many religious groups for religious purposes and as places of worship.

The question of other suitable places in the Grand Rapids school district for Jehovah's Witnesses' use is an important issue in this case as is shown by the fact that petitioners expressly deny in paragraphs 7, 8 and 15 (R. 24) of their petition (R. 24, 25, 29) that there are any other suitable places in the district, and their committee so testified. (R. 54 and 55.)

> "Accordingly the relators found that the only suitable place for the holding of a public meeting in Grand Rapids was the public school auditorium under the control of the respondents.
>
> "There being no available public halls or suitable auditorium for such in Grand Rapids other than the school auditorium under control of the respondents, relators planned to request permission to use it." "that it is impossible to secure any other suitable place to invite the people in the village of Grand Rapids for the hearing of such public lectures."

At Pages 26 and 27 of petitioners' brief they claim it to be immaterial that other suitable places of worship exist in the village. Then why did they deem it so necessary in their petition, and allege the absence of such places at three points in the petition? They made this one of the issues and the weight of the evidence clearly shows the issue to be found in favor of petitioners that many other suitable places of worship did exist in the village.

Our contention that Jehovah's Witnesses did not desire the auditorium, but only wished to create a lawsuit and disrupt the village of Grand Rapids and the school system, is further proven by the fact that Jehovah's Witnesses do not build churches, do not believe it proper to spend

money for churches, and that they preach and believe that public parks, streets and homes are suitable places for them to conduct their religious services (R. 86, 111). Ex. I, "Let God Be True":

> "Jehovah's Witnesses do not waste time and money by building large church edifices to invite people to such to hear them preach. Experience and statistics prove that not all people can be reached in that manner, because they will not all come to such buildings."
>
> "They go even farther than that by providing the people with opportunities to receive the message in public places and streets."

Petitioners' own testimony showed that they had a private home in the village of Haskins, some three or four miles from Grand Rapids, which was suitable for their purposes and which was open to them (R. 110).

Throughout the record petitioners attempted to deny and evade the question that the auditorium would be used as a place of worship. However, they were finally forced to admit that services of worship would be conducted by them in the auditorium (R. 90 and 96).

> "Q. And use it as a place of worship? A. Well, yes." (Krebs)
>
> "Q. As a place of worship? A. That is right." (Puse)

The use of the auditorium by petitioners as they desired would have been a direct interference with its use for school purposes, as petitioners desired to use it at all times in the future:

> "*Relators desire to use said auditorium for the purpose of holding said public meetings for all time to come in the future and have so informed the respondents.*"

Their Toledo leader, Mr. Greisiger, also testified at page 56 that they wished to use the building at all times in the future:

"A. Any time in the future that we may want to use it.

"Q. You say, 'At all times in the future'? A. 'That is right.'"

This would hamper basketball and play practice in the school as was testified by Superintendent Jones (R. 171, 172, 182) and it would further prevent the scheduling of any school activities on any Sunday afternoon.

By reason of this direct interference with school activities and because Jehovah's Witnesses was not a responsible organization in the opinion of the respondent board (R. 137, 140, 171) and because its members were unknown to the board, and for the further reason that their teachings were opposed to the teachings had in the public school system as to patriotism, jury service, respect for the courts, the duty to vote, scouting, obedience to selective service and to all laws (R. 157, 174, 176, 177), the board refused to grant petitioners the right to use the building. The lack of responsibility on the part of petitioners is shown by the fact that three of their witnesses who testified had been convicted of evading the selective service law, and further that four of their Toledo congregation had been convicted (R. 58). Also, they did not offer to pay when confronting the board for the use of the building (R. 148). There are ways to disrupt the school system and interfere with its work other than by direct interference through meetings. If the teachings of Jehovah's Witnesses seek to tear down that which the school attempts to create through its teachings, this certainly is a direct interference with the school function and the school's use of its own property in violation of Section 4839-1. Jehovah's Witnesses preach and believe that they should not vote or serve on juries (R. 57) or

render any other political obligation of any sort, which of course would include the payment of taxes (R. 84) and they refuse to abide by the Selective Service Act (R. 57 and 58) or to abide by the rules of the board with reference to the use of the building (R. 59 and 99) and they are unpatriotic (R. 174) even to the extent that they would not fight if their country were invaded (114, 115 and 126); whereas the school teaches the direct opposite of these doctrines (R. 140, 157 to 181). School books, Exs. 5, 7, 8, 11, 13, and other text books are in evidence. The school also advocates the principles of religious tolerance and unity between the various religous sects (R. 177) whereas Ex. 14, The Enemy, published by Jehovah's Witnesses, refers to the Catholic clergy as racketeers (R. 178). Petitioners also testified that they opposed the Jews and the Catholics (R. 84 and 85).

Petitioners testified that they desired to use the auditorium for their religious purposes (R. 90 and 96) and the board, endeavoring to preserve unity in their school system and community (R. 156, 161 and 177) and believing that public tax moneys cannot be used to provide a place of worship, denied such use of the auditorium (R. 154). It is true that other sects had used the auditorium, but always for union services or for a daily vacation Bible school sponsored by all of the churches, Catholic or Protestant in the school district (R. 150) and Jehovah's Witnesses would have been welcome to attend and participate in said services. The board has never permitted the use of the auditorium by any separate or individual sect (R. 196).

Not only would the contrary teaching of petitioners seriously infringe upon the original and necessary use of the auditorium contrary to 4839-1 OGC, but it would also cause an ill feeling in the school system and in the community. This is especially true and further reason for the denial of the auditorium as we find that petitioners

would refuse to abide by the rules of the board (pages 59 and 99). Petitioners sell books as is shown by the fact that the price is printed in practically all of their exhibits (R. 59 and 99) and yet they would refuse to pay even the sum of one dollar per year for the right to sell said books upon school property as required by the board's rule. The purpose of this rule was merely to prevent the dissemination of subversive or unwholesome literature.

Respondents introduced resolutions of the Exchange Club of Grand Rapids, signed by Lowell Studer, President, and Charles M. Lawson, Secretary, the Parent-Teachers' Association, the American Legion Auxiliary Post 232, the American Legion Post 232, Providence Grange No. 2572, all of which strongly protested the use of the school building as a place of worship by petitioners (R. 150, 195 and 196).

In addition to these instruments of opposition a petition was circulated independent of the board's direction (R. 130 and 131) which was signed by some five hundred thirty citizens and persons residing in the school district (R. 127 to 132). These persons were all taxpayers and urged the board not to let petitioners have the auditorium. In fact about 99.9 per cent of all adult residents and taxpayers in the school district signed one of these petitions (Exs. 2 through 2-H, R. 217 to 228).

IV

McCOLLUM CASE

Illinois ex rel. McCollum vs. Board of Education, Champaign County, 33 U. S. 203, 92 L. Ed. 649, 68 S. Ct. 461 (1948).

We are discussing this case separately in our brief as it is so close on the facts to the case at bar, and because it is the latest pronouncement of this Court upon this problem. There the Court clearly and unequivocally held that "not one dollar" of State moneys could be used to support a place of worship and that "no tax can be levied to support organizations intended to teach or practice religion." The majority and minority of the Court agreed upon this principle.

Section 4839-1, OGC, provides that the public schools of Ohio shall not be used for other than school purposes when the same "infringes upon the original and necessary uses of such properties." The teachings of Jehovah's Witnesses and which they propose to expound in the Grand Rapids school buildings are in direct conflict with the teachings of the public schools in said Village.

TEACHINGS OF GRAND RAPIDS SCHOOL DISTRICT

1. Obedience to the Court
   a. Visits of *students* to Court of Common Pleas of Wood County, while in session.
   b. Duty to render jury service, 206.
   c. Duty to abide by and respect all decisions of the Courts, 206.
2. Respect and obedience for all laws, 202.
3. Obedience to the Selective Service Law, 205.
4. Advocating harmony among the denominations and the practicing of religious unity, promulgating of union church services, 208.

5. Respect for the flag, 210.
6. Promulgation of Scouting, 202, 210.
7. The important duty of the citizen to vote, 204, 214.

DOCTRINES OF JEHOVAH'S WITNESSES

1. Disobedience of the Courts:
   a. Refusal to serve on juries or to abide by any decision or ruling of the court when not serving their own interests and contrary to their teachings and doctrines.
2. Disobedience to all laws contrary to the beliefs of Relators.
3. Absolute refusal to obey Selective Service Act.
4. Disregard for all other religions, use of vile and slanderous terms for Jews, Catholic and Protestant clergy, publishing of inflammatory documents, such as "Enemies," Exhibit 14, page 208, referring to Protestant clergy as instruments of Satan, and the Jews and Catholics as racketeers.
5. Disregard and disrespect for the flag.
6. Disbelief in Scouting.
7. Absolute refusal to vote.

This situation is bound to lead to strife, bickering and conflict within the school system which is at all times to be avoided as was pointed out by this Court in the *McCollum* case where the Court quoted from *Everson vs. Board of Education*, 330 U. S. 1, 91 L. Ed. 711 and 712:

> "In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict."

The *Everson* case also held that "no tax in any amount, large or small, can be levied to support any religious activities or institutions."

Section 4839, OGC, provides that when school buildings are used for non-school purposes such usage shall in

"no wise interfere with the public schools in such district." This interference need not be a direct interference as was demonstrated by the court in *Payroll Guaranty Association vs. Board of Education of San Francisco, Cal.*, 27 Cal. 2d A. D. U. 213, 161 A. L. R. 1300, 161 Pac. 2d 43 (1945), where the court denied mandamus to an organization which desired to bring Gerald L. K. Smith to the school building to give an address. Such meeting would result in picketing, loud noise and a general disturbance, which noise and picketing would interfere with the school work, although so far as the petitioners were concerned school would go on just the same. There are many ways in which the school system can be interfered with and its work disrupted without burning down the school house. The teaching of doctrines in the school by a religious sect in direct opposition to the doctrines taught by the teachers in said school system and made a part of its program is a direct interference with the work of the public school. Superintendent Jones on the witness stand and Board Member Box clearly demonstrated a wide divergence between the beliefs and teachings of petitioners and those had in the Grand Rapids School system.

This case clearly refutes *Danskin vs. San Diego Unified School District*, 28 Cal. 2d 885, which involves the taking of a non-Communist oath prior to the use of the school building. No such facts are involved in our case and the *Payroll Guaranty* case, *supra*, is much closer to our case on the facts and therefore controls over the *Danskin* case, appearing in petitioners' brief at Pages 22 and 23.

This Court has followed and approved the *McCollum* case in *Soia vs. New York*, 334 U. S. 558, 92 L. Ed. 1574, which was a civil liberties case involving a permit for the use of a loud speaker. The Court stated as follows: "The Constitution prohibits a State or municipality from using tax supported property to aid religious groups to spread

their faith, *McCollum vs. Board of Education*, 333 U. S. 203."

Petitioners at Pages 24 and 25 of their brief seek to distinguish the *McCollum* case on the ground that the student was compelled to take the courses in religious instruction offered in the Champaign, Illinois, public schools. This is absolutely contrary to the decision of this Court as the facts and the opinion both show that the student could pursue his secular training if he did not desire to attend the religious instruction period. See 68 S. Ct. 461 at 476:

> "Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground."

V

CONDUCTING RELIGIOUS SERVICES UPON SCHOOL PROPERTY VIOLATES THE PROVISIONS OF THE OHIO CONSTITUTION.

Article I, Section 7, of the *Ohio Constitution* provides as follows:

> "No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law to any religious society; nor shall any interference with the rights of conscience be permitted."

Petitioners cite no Ohio cases whatsoever in their brief upon this subject. We believe the last decision of the Supreme Court of Ohio conclusively proves that this section of the constitution means exactly what it clearly states and the public funds secured from taxation cannot be diverted to the support of a school giving religious training or religious instruction.

Findley vs. Conneaut, 27 O. O. page 46 (1943 Ashland County Probate Court) 145 O. S. 480, 31 O. O. 161 cited in the *McCollum* case at page 485. This case was an action to construe the will of George J. Record, said will providing that the residue of said estate should be used by the city of Conneaut, Ohio, in the establishing of a school for both sexes, which school should give instructions in the useful Arts and Sciences and the teachings of the Holy Bible, and that the same should be made a prominent feature in bringing up the minds of the young, and that testator's gift should be matched by the city of Conneaut by providing $100,000.00, which sum should be used as a sinking fund to forever maintain and provide income for the support of said school. The Probate Court held that the municipality had no authority to issue such bonds or expend funds raised by taxation for the support of a private, religious, technical school. This judgment was affirmed by the Supreme Court of Ohio in 1945, the Syllabus reading in part as follows:

> "A will which provides for the establishment of a school for education in the arts and sciences, with the teachings of the Holy Bible being made a prominent feature, and that the school shall be Protestant in ethics and teaching, authorizes the creation of a sectarian school.
>
> "A municipality in Ohio is without authority to issue bonds or to expend funds raised by taxation for the support or maintenance of a sectarian school."

Page 161 of 31 O. O.

The testimony in this case was that the maintenance of the auditorium, the decoration thereof, and the custodian's fees, and repairs to said auditorium were paid from tax moneys (R. 170). The Court will also take judicial notice of the statutes in conformity with such testimony. Many taxpayers testified in our case that they were opposed to Jehovah's Witnesses using this building as a place

of religion or as a place of worship; therefore they cannot be forced to support this sect (R. 170).

This being true, of course, the constitution controls and petitioners' writ must be denied. We again call to the Court's attention that it is immaterial under the *Everson* and *McCollum* cases how slight or how small the amount of money so used.

The courts of many other states have decided that religious services cannot be held in school houses by reason of the fact that it is an illegal diversion of tax moneys and gives a support or aid to religion from public moneys contrary to law and the various constitutions of the states:

Mitchell vs. Consolidated School Dist. (1943) 17 Wash. 2d 61, 135 P. 2d 79, 146 ALP 612;

Traub vs. Brown (1934) 36 Del 181, 172 A 835 [writ of error dismissed in (1938) 39 Del 187, 197 A 478];

Judd vs. Bd. of Educ. (1938) 278 N. Y. 200, 15 NE 2d 134;

Gurney vs. Ferguson (1941) 190 Okla. 254, 122 P 2d 1002 [*writ of certiorari* denied in (1942) 317 US 588, 87 L. ed. 481, 63 S. Ct. 34, rehearing denied in (1942) 317 US 707, 87 L. ed. 564, 63 S. Ct. 153];

Sherrard vs. Jefferson County Bd. of Educ. (1943) 294 Ky. 469, 171 SW 2d 963.

State ex rel. Van Straten vs. Milquet (1923) 180 Wis. 109, 192 NW 392.

A. Does the Contemplated Use of the Auditorium By Petitioners Make It a Place of Worship?

In petitioners' petition we find that they desire to use this building as a place for "having Bible lectures," (Paragraphs 10 and 13), discussions concerning the "Kingdom

of Almighty God and its establishment to bring peace and blessings to the peoples of the earth," (Paragraph 17), and that it is to be used so that petitioners may have "freedom to worship Almighty God in said school auditorium and publicly," (Paragraph 21). Petitioners' brief at page 8 states that they are a congregation of Christian, missionary evangelists; at page 7 The Watch Tower Bible and Tract Society is described as a missionary society and that Jehovah's Witnesses is a missionary group preaching the Gospel of God's Kingdom throughout the world; and at page 9 petitioners finally admit that the evidence in this case shows that they intended to use the auditorium for "religious exercises" although it was apparent from the testimony of their witnesses that they had been carefully coached to avoid the use of the word *worship* as apparently their leaders are afraid of this provision in our Constitution. Also the last section of the brief, with its numerous Scriptural references and Biblical quotations, clearly shows that the auditorium will be used to hold evangelistic, religious meetings by Jehovah's Witnesses, which is a recognized religious sect, as was judicially determined in *Borchert vs. Ranger*, 42 F. Supp. 577 "according to our laws and our information is a religion." Petitioners also claim their rights to be recognized as ministers and missionaries (R. 82, Petitioners' Brief, page 8).

Under vigorous cross-examination by Mr. Coller, Lloyd Puse, one of petitioners' witnesses and a minister of its faith, admitted that the building was to be used as a place of worship (R. 125).

Under the authorities of all of the states such usage is clearly worshipping and converts the school auditorium into a religious edifice for a place of worship, which cannot be supported by public funds.

> "'Worship' is defined by Webster as 'the act of paying honor to the Supreme Being; religious

reverence or homage; adoration paid to God, or a being viewed as God.' Worship may be that of an individual, and for that reason, if not for others, the definition of the word is not sufficiently comprehensive to be accepted as the definition of the words "public worship," as used in a statute exempting property used for public worship from taxation; and an association formed to promote growth in grace and Christian fellowship expressly by and for young men, and to seek out and aid worthy poor, was not an association formed for purposes of religious worship. In re Walker, 66 N. E. 144, 146, 200 Ill. 566, citing *Hamsher vs. Hamsher,* 132 Ill. 273, 22 N. E. 1123, 8 LRA 556."

VI

PETITIONERS HAVE CHOSEN THE WRONG REMEDY

Under this section of our brief we will discuss:

A. The Impropriety of the Use of Mandamus.
B. Declaratory Judgment.

A. The Impropriety of the Use of Mandamus

If any other remedy is available to Petitioners, they cannot use Mandamus; *Section 12287 OGC:*

> "The writ *must* not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law. It may issue on the information of the party beneficially interested. (R. S. Section 6744.)"

It will be noticed that this section of the Code is mandatory, the word "must" appearing in the above section. The Supreme Court of Ohio has interpreted this section as being mandatory. *State ex rel. Cope vs. Cooper, Governor,* 121 O. S. 519:

> "A writ of mandamus does not issue in virtue of any prerogative power, and in modern practice a proceeding in mandamus is an action at law in cases

where it is the appropriate remedy, and where there is no plain and adequate remedy in the ordinary course of law."

The Courts of Ohio have decided in a long line of cases that mandamus cannot be used to control a board or public body in the exercise of its discretion and that it cannot be used to control discretion. In this connection let us examine *Sections 4839, 4839-1, 4839-2* and *4839-4* as the same are found in the appendix to this brief. It will be noticed that the first section makes it necessary for the board to determine what usage of the building or what activities therein interfere with the public schools and that this certainly calls for the exercise of the board's discretion. We further find that Section 4839-1 is replete with terms of a vague or general meaning requiring interpretation by the board, the exercise of sound judgment and discretion, to-wit:

State ex rel. Brophy vs. Crawford, 127 O. S. 580:

"Such writ will not lie to control discretion of an officer."

State vs. The Board of Education of Worthington, 105 O. S. 438:

"A writ of mandamus may issue only to require the performance of an act specially enjoined by law, and may not be employed to control the discretion lodged by statute in a public board or officer.

"The board of education of a district wherein is located a private children's home is not required by the provisions of Section 7681, General Code, to admit to the schools of such district children who are inmates thereof who are not the children, wards or apprentices of actual residents of such district."

State, ex. Williams vs. Glander, 46 Abs. 630.

"A writ of mandamus will not be awarded to relator who seeks to control a course of conduct of a

public officer by requiring him to follow the law generally. (1946)

State, ex rel. Erman vs. Gilman, 44 OA 339, (Hamilton County Appeals, 1932):

"Mandamus does not lie where matter complained of involves exercise of quasi-judicial or discretionary powers."

The Ohio Statutes involved, Sections 4839 to 4839-4, inclusive, use the following terms:

"in any wise interferes with the public schools,"
"for any purpose other than is authorized by law,"
"responsible organizations,"
"social centers,"
"entertainment and education,"
"all topics tending to the development of personal character and of civic welfare and for religious exercises,"
"should not seriously infringe upon the original and necessary use,"
"public officials 'shall prescribe such rules and regulations' as will secure a fair, reasonable and impartial use,"
"For such other purposes as may make for the welfare of the community,"
"and shall if required pay."

which clearly and explicitly call for the exercise of discretion by any board of education when permitting the use of the school building for other than school purposes. Thus the statutes contradict and annihilate petitioners' argument which makes Jehovah's Witnesses' right to use the auditorium absolute and without qualification. The courts of Ohio by eleven of its judges unanimously deciding that there has been no abuse of discretion, this Court has no right to interfere with their ruling as is shown by the following Ohio *school* cases involving the remedy of *Mandamus*:

State ex rel. vs. Board of Education, 76 Ohio St., 297;

Brannon vs. Board of Education, 99 Ohio St., 369;

State ex rel. vs. Blake, et al., 144 Ohio St., 619;

State ex rel. vs. Court of Common Pleas, 131 Ohio St., 23;

Greco vs. Roper, et al., 145 Ohio St., 243;

State ex rel. vs. Board of Education, 151 Ohio St., 81.

State ex rel. Ross vs. Board of Education, 42 O. S. 374 (1884).

Board of Education vs. State ex rel. Wickham (1909) 80 O. S. 133;

State ex rel. VanHarlingen vs. The Board of Education (1922) 104 O. S. 360;

State ex rel. Wood County Board of Education vs. Board of Education of Bloom Township, Ohio (1922) 104 O. S. 75;

Krejsa vs. Board of Education of Cleveland (1887) 1 C. D. 614;

Merrill vs. Board of Education (1889) 2 C. D. 441;

Bryce Furnace Company vs. Board of Education of Toledo (1897) Lucas County Circuit Court 7 C. D. 338;

Welsh vs. Board of Education (1897) 8 C. D. 166;

Crawford vs. Board of Education (1899) 10 C. D. 678:

"COURTS CANNOT INTERFERE BY MANDAMUS

Section 4017, Rev. Stat., expressly authorizing the board of education to confirm or not to confirm the election of teachers by the sub-directors, confers

an administrative discretion, with which courts are not authorized to interfere, although it is alleged that the board acted in bad faith, and wrongfully and in pursuance of a conspiracy."

Rogers vs. Board of Education (1903) 14 C. D. 383;

Mathis vs. Cincinnati Board of Education (1905) 17 C. D. 832;

Lewis vs. Richardson (1908) 20 C. D. 622;

Dale vs. Columbus Board of Education (1899) 6 N. P. 347, 9 O. D. 336:

"Under the provisions of Section 3988, Rev. Stat., where a board of education has, in good faith, exercised its judgment respecting the responsibility of bidders, mandamus will not lie to compel it to change its decision."

Sturdevant vs. Board of Education (1901) 8 N. P. 202, 11 D. 289;

McCarthy vs. Brewster, Auditor, (1884) 9 O. D. R. 357;

State ex rel. Bank vs. Madison School District (1905) 15 O. D. 720.

In other words the Courts never have the right to become the adjudicators of the facts so as to impose their opinion or their thoughts and ideas as to discretion over and upon those of the Board of Education.

The Ohio Courts have also frequently held in other types of cases that mandamus cannot be used to control the discretion of a public body. *State ex rel. vs. Crites,* 48 O. S. 460:

"The remedy by mandamus, while appropriate to compel an officer to proceed in a judicial or quasi-judicial matter confided by law to his jurisdiction, cannot be involved to correct his errors, or control his discretion."

Petitioners in their brief seek to answer the rule as to no mandamus in discretionary matters by contending that our board has been guilty of an abuse of discretion. Only one Ohio school case is cited in support of this contention 28, *State ex rel. Weave vs. Board of Trustees of Ohio State University* (1933) 126 O. S. 290. This case is the famous Ohio State University Home Economics racial problem case; the case where the University adopted rules denying colored female home economic students the rights of white students in said department. The court held this to be an abuse of discretion. This case is no way similar to our case as no showing was made, nor can any showing be made, that the colored race is inherently in any way inferior to the white race and no logical basis could be provided for the distinction made between white girls and colored girls. In our case, however, we have a group of people desiring to use our school building who refuse to abide by any laws of the State of Ohio or the United States which, in their opinion, are contrary to the Scriptures. They refuse to obey the Federal Selective Service Act, they refuse to abide by the Ohio Jury Code, all of which would lawfully make them an irresponsible organization and one which the board had every right to find not responsible. Certainly the above reasons constitute ample grounds for the board's refusal to let them use the building and the same in no way constitutes an abuse of discretion. We have read all the cases in Ohio pertaining to an abuse of discretion by boards of education and we find no other cases in which mandamus has ever been allowed for an abuse of discretion in school cases.

Mr. Covington further attempts to justify the mandamus in this case upon the ground that mandamus has been issued in Ohio cases involving the issuance of licenses (28 Petitioners' brief) and he relies principally upon *State ex rel. Homan vs. The Board of Embalmers,* 135 O. S. 321, 14 O. O. 221 (1939) where the court was construing Sec-

tion 1335-10 which provides that any person engaged in the business of funeral directing upon paying a $10.00 fee and filling out a form shall be entitled to a license "and the board shall issue to such person a license." There is nothing discretionary involved in the language of said section and it is purely a directive to the Board of Embalmers, requiring them to perform some ministerial act, namely, the issuance of a license. This in no way is comparable to the case at bar, where the statutes involved are based entirely upon terms requiring and necessitating the application of judgment and discretion by the board.

The jurisdiction vested in the board makes their acts administrative or executive rather than ministerial for there is no absolute, certain and imperative duty resting upon them as petitioners claim. The rights of petitioners not being absolute and the duties not being absolute or certain, they are not performing a ministerial act subject to control by mandamus.

> "Official duty is 'ministerial,' when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts. *People vs. May*, 95 N. E. 999, 1000, 251 Ill. 54, Ann. Cas. 1912C, 510." *27 Words and Phrases.*

The same rule has been applied in Ohio in *State ex rel. Greenwood vs. Balls*, 66 O. A. 255, 19 O. O. 573, where the court held that in a restitution action, the issuance of a Writ of Restitution was ministerial as the Justice had no discretion as the statute made it mandatory upon him to issue the writ. See in accord *Greenwood vs. Zangerly, Auditor*, 13 O. S. 533, 21 N. E. 2d Sec. 662, where the duty enjoined upon the County Auditor was absolute and mandatory.

B. Declaratory Judgment Is the Proper Remedy in This Type of Action, and, Therefore, Mandamus Is Not the Exclusive Remedy and Cannot Be Used.

As shown by Section 12287 quoted above mandamus must not be used when complainant has "a plain and adequate remedy in the ordinary course of law." Petitioners had a plain and adequate remedy in the ordinary course of law in that they could have sought or applied for a declaratory judgment.

The following sections of the Declaratory Judgment Act show that such remedy is admirably suited to cases of this kind, for it applies whether the relief sought is affirmative or negative and may be used to declare rights, status and other legal relations as the same are affected by statute, municipal ordinances, contract or franchise; and it is also used to construe and determine the validity of a statute, ordinance, and the rights of the parties and their legal status or legal relations thereunder.

SECTION 12102-1, OHIO GENERAL CODE

> "Declaratory judgments, when granted, force and effect.
>
> "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (115 vs. 495. Eff. Oct. 9, 1933.)"

SECTION 12102-2, OHIO GENERAL CODE

"Construction and validity may be determined, when:

"Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder. (115 vs. 495. Eff. Oct. 9, 1933.)"

The Ohio Declaratory Judgment Act has been used in determining the above questions when involving a public board or an official body.

Finefrock vs. Muskegon Water Shed Conservancy District (1937), 56 O. A. 271, 9 O. O. 376;

Village of Bay vs. Gelvick (1937), 58 O. A. 51:

"A Common Pleas Court has jurisdiction to render a declaratory judgment as to the rights, status, and legal relations of a municipality and the residents thereof arising under a municipal zoning ordinance, regardless of whether further relief is or could be claimed.

"A municipality is a 'person' authorized, under the provisions of Section 12102-2, General Code, to bring an action for a declaratory judgment, and is a necessary and mandatory party to any proceeding which involves the validity of a municipal ordinance." 11 O. O. 457.

Guttlis, Mayor, vs. Gillen (1939) 15 O. O. 51;

Driskill vs. City of Cincinnati, 66 O. A. 372, 20 O. O. 245 (1940).

City of Cleveland vs. Division of the Amalgamated System of Street Railway Employees (1944) 29 O. O. 150.

In *Mitchell vs. Consolidated School District* (1943), Wash. 135 Pacific 2d 79, where the issue was the right of parochial schools to receive transportation moneys, this being another one of the famous *School Bus* cases, a declaratory judgment was used and the court found that such schools were not entitled to such moneys as it would be a diversion of public moneys for private or religious uses.

Professor Borchard, in his book, Declaratory Judgments, 1941 2d Edition, at pages 288, 328 and 360, states that declaratory judgments are preferable in disputes involving public bodies over the cumbersome remedies of mandamus, etc.

> "To enable public duties and powers to be established without the cumbersome and technical prerequisites of mandamus, *certiorari*, injunction, prohibibition, or habeas corpus."

Fidelity Nat. Bank & Trust Co. vs. Swope, 274 U. S. 123, 131, 47 Sup. Ct. 511 (1927).

Nashville, Chattanooga & St. Louis Ry. vs. Wallace, 274 U. S. 249, 53 Sup. Ct. 345 (1933) *supra*, p. 195.

Robinson vs. Moser, 203 Ind. 66, 179 N. E. 270 (1931) (plaintiff's term of office, placed in doubt by new statute under which defendant claimed office, established by declaration).

Little vs. Smith, 124 Kan. 237, 257 Pac. 959 (1927) (privileged to carry cigarette advertisements without penalty).

VII

CITIZENS' PETITIONS AND PETITIONS OF CIVIC GROUPS OFFERED IN EVIDENCE BY RESPONDENTS

At the time of trial Respondents offered in evidence petitions marked "Exhibit 2 H" which contained approximately 524 signatures, or about 99 per cent of all of the citizens in the Grand Rapids School District. These petitions strongly objected to Jehovah Witnesses' use of the auditorium. Many of the signers of these petitions were taxpayers in the school district and owned real estate therein, and said persons requested that the proposed use of the auditorium be prohibited by the board. Resolutions were received by the board of like import from the American Legion Auxiliary Post, from the American Legion, from the Grange, the Grand Rapids Exchange Club, and the Parent-Teachers Association of the Grand Rapids School District, Exhibits 3, 4, 15, 16 and 17.

These petitions and resolutions are admissible in evidence as showing that taxpayers in the Grand Rapids School District strongly object to the diversion of school taxes paid by them to the support of a place of worship, or in the use of the same to favor, help or aid Jehovah Witnesses, a religious sect.

In the "Flag Salute" case the court admitted such instruments, documents, or petitions, to show public opinion and opposition to the flag salute, therefore they are admissible in the instant case. *W. Va. State Board of Education vs. Barnette* (1943), 319 U. S. 624, 87 L. ed. (A. D. O. 1171) 63 S. Ct. 1178, 147 A. L. R. 676:

> "Objection to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs."

The record also shows that the National Headquarters of the United States Flag Association were interested in the matter.

The court held that public opinion controlled the authorities in matters of this kind or in civil rights decisions and not that the authorities were to control public opinion. *West Virginia State Board of Education vs. Walter Barnette*, June 14, 1943, 319 U. S. 624, 87 L. ed. 1171, 63 S. Ct. 1178, A. L. R. 683:

This being the rule how can public opinion be determined without the aid of such petitions and resolutions aforesaid?

VIII

REFUSAL OF JEHOVAH WITNESSES TO ABIDE BY THE RULES ADOPTED BY THE BOARD OF EDUCATION.

Section 4839-1 provides that the board "shall prescribe such rules and regulations for their occupancy and use as will secure fair, reasonable and impartial use of the same." The board adopted a code of rules and regulations at its organization meeting in early January, 1949. The leader of Jehovah Witnesses, Mr. Joseph M. Greisiger, and others of Petitioners' Witnesses, testified they did refuse to abide by the rules, (R. 99 and 59). This again shows their placing themselves above the law and gives additional reasons for refusing them the use of the auditorium as they are not abiding by the Ohio School Code. It further shows a direct interference with the school system in that Petitioners directly oppose the rules and regulations made by the board to prevent any interference with the school system.

Petitioners would be selling their books and publications in the school building, which directly opposes the principles of Government, Sociology and Civics as taught in the schools, and while they contend there would be no such sales the fact remains that each of said books produced in evidence carries a price or selling price therein. One of the rules adopted provides for an annual fee of $1.00 to be charged all persons selling printed matter on the school premises. This rule is to prevent the sale of any lascivious, libelous or subversive propaganda in the school building. This rule is one of the rules Petitioners condemned and refuse to abide by. Such a regulatory license fee, nominal in amount, is permitted under *Murdock vs. Pennsylvania* (1943), 319 U. S. 104, 87 L. ed. 1292.

IX

ABUNDANCE OF OTHER SUITABLE PLACES FOR HOLDING PETITIONERS' MEETINGS

Exhibit I, "Let God Be True," published by the Watch Tower Bible and Tract Society, 1946, and carrying price lists therein for other publications by said Society, states at pages 214 and 215 that their meetings can be held in public places or upon the streets, and that they do not believe in spending time or money in the building of churches.

> "Jehovah's Witnesses do not waste time and money by building large church edifices to invite people to such to hear them preach. Experience and statistics prove that not all people can be reached in that manner, because they will not all come to such buildings.
>
> "They go even farther than that by providing the people with opportunities to receive the message in public places and streets."

No showing whatsoever had been made of any denial or prohibition to or against Petitioners meeting in the public streets, parks, shelter houses, lodge halls, or Town Hall existing in and about the village of Grand Rapids and in said school district. There is an abundance of evidence that these are suitable places, not only for holding meetings by Petitioners, 187 to 194, but by any other religious sect, and that the same have frequently been used by other churches. Members of the Evangelistic Committee of the East Toledo Unit who testified stated that they could not find the Mayor of the Village of Grand Rapids in order to seek permission to use the Town Hall, yet they found many members of the school board who live far outside the Village of Grand Rapids. In fact, the diligent evangelists of Petitioners could not even find the Mayor when they were sitting in his home talking to his wife, who is the Clerk of the Board of Education, the Mayor being present at said conversation; nor could they find the Park Superintendent, who lived across the street from the park. These facts are more important than they might seem at first blush; they clearly demonstrate that Petitioners had no desire to hold meetings in the public school, especially if voluntary permission was secured; all they were interested in was the extensive publicity which would occur by reason of their filing this law suit.

Petitioner now in his brief at pages 26 and 27 claims that it is immaterial that there are other suitable places in which these meetings could be held in said village. If this be true, let him answer this question: Why did he state emphatically at several points in his petition that there were not other proper places or suitable places for the holding of said meetings in this village? See Paragraphs 7, 8 and 15:

> "Accordingly the relators found that the only suitable place for the holding of a public meeting

in Grand Rapids was the public school auditorium under the control of the respondents."

"There being no available public halls or suitable auditorium for such in Grand Rapids other than the school auditorium under control of the respondents, relators planned to request permission to use it."

"that it is impossible to secure any other suitable place to invite the people in the village of Grand Rapids for the hearing of such public lectures;".

The only conclusion that can be reached is that Petitioners, experts in the law of civil liberties, knew that if there were numerous other suitable places to meet in this village it was the duty of his client to first exhaust every reasonable opportunity to secure said buildings. Such buildings do exist and no effort was made to secure them, therefore, there are many other halls which would well suit Petitioners' needs, and the usage of which would not interfere with the public school system. Petitioners have failed dismally upon their proof and evidence submitted on this issue appearing in their petition.

X

FLAG SALUTE

This case and comment thereon is found at page 21 of Petitioners' brief. The case cannot be considered as authority in this case by reason of the fact that the West Virginia Statute made it compulsory that the student give a Hitler-like salute to the flag, or be expelled from the school, and that he could not return to school until he agreed and promised to salute the flag, and while so expelled and so absent from school his parents or guardian were liable to a fine or imprisonment, or both, for failure to send said child to the public schools. Thus we find in the statute a great and stringent curbing of the principles of

civil liberties coupled with fines, imprisonment and loss of the right of education in the public schools. Our situation is exactly to the contrary, there is no duty or obligation resting upon Petitioners to worship in our auditorium. It is not obligatory that they drive thirty miles in order to invade a community where they are not wanted for the purpose of fomenting strife in the public school system and disrupting the community at large. There are many other places to worship in their home communities, and there are many other places they can worship in the community of Grand Rapids outside this auditorium. This being true there can be found no denial great or small of Petitioners' right to worship God according to the dictates of their own conscience and as they may see fit. Any inconvenience suffered by them is so slight and trivial, and any infringement upon their rights is so meager, that to apply the doctrine of "DeMinimis" would constitute a great exaggeration.

It will be remembered that in the *McCollum* case and the *Barnette Flag Salute* case the cardinal issue decided by the court was that a child must not be compelled, forced or coerced into saluting the flag or attending religious services in the schools. Let Petitioners point out the slightest use of force or coercion in this case.

XI

CASES CITED IN PETITIONERS' BRIEF

A. Pertaining to Use of Public Streets and Parks

B. Discrimination Claimed By Petitioners in Use of School Building

A. Petitioner attempts to contend at pages 63-68 of his brief that school buildings now stand in the same category as public streets or parks. That while this was not true originally (pages 25 and 29 of his brief) it is now true by reason of the Civic Center Statute and other statutes found in the various states similar to our school code. This is clearly an error for certainly the public is not vested with the same rights in and to a school building as they are with reference to the public streets. Section 3714 O. G. C. says that all streets, alleys, public grounds, bridges, viaducts and highways shall be under the supervision of the council and they shall be "kept open, in repair, and free from nuisance." This clearly vests in the public an absolute and unconditional right to use public streets, parks, playgrounds, etc. No such unqualified authority is found with reference to the use of school buildings, but to the contrary the school laws constantly hedge about the use of school buildings with many, many qualifications and conditions, therefore the cases pertaining to the use of streets or parks are not authority for the use of school buildings, nor can any analogy spring therefrom, for the public has the absolute right to use the streets, parks and playgrounds, but it can only use the school buildings for non-school purposes when in compliance with the many conditions found in the school code.

Petitioners cite the case of *Bigelow vs. Spigle, Mayor,*

22 O. C. N. S. 337, 43 O. C. C. 595 at page 29 of their brief, which is in no way authority in the instant case, for there a religious sect was barred from holding meetings or promulgating its teachings throughout practically the entire city of Cincinnati. It was prohibited from holding street corner meetings and from holding a parade upon the street. This extreme prohibition exercised in this case cannot be compared with the situation before the court where no effort has ever been made and no refusal shown of the right to use the public streets, public parks, halls or shelter houses of Grand Rapids for the promulgation of Petitioners' doctrine. A severe hardship accrued to Petitioners in the *Bigelow* case who had a church in Cincinnati and were residents of Cincinnati. No such hardship is found here for the record is entirely silent as to Petitioners having any members whatsoever within this entire school district. Furthermore, all persons desiring to use the school auditorium in the present case are non-residents of the school district, all of whom can worship in the manner they choose in the community in which they live and it is not necessary for them to drive some twenty or thirty miles and attempt to use a building in a community in which they are not wanted and where the building was built from funds secured through the taxation of persons not in harmony with Petitioners' teachings and who object to their doctrines.

B. At page 26 of Petitioners' brief he points out that other religious sects had been permitted to use the school building, and he therefore claims that the denial of the use of the same to Jehovah's Witnesses constitutes discrimination against that sect. This is a misinterpretation of the facts involved for we find at pages 150, 154, and 159 to 163 that the school building has been used by a number of other religious groups all of whom were meeting in union services and acting in close harmony. Furthermore, Board

Member Box testified that the building was open for use by Jehovah's Witnesses provided they requested the same in good faith and used it in conformance with the laws of Ohio.

> "A. We were trying to keep things. I think I am answering your question if I am permitted I will say: We try (fol. 256) to obey the state statute and we were trying to be impartial to any religion. We did not want to be partial to one and not the other by allowing them to use it.
>
> Q. You mean all together?
>
> A. We were doing this in good faith, trying to conform with the laws of Ohio, the statutes." (R. 163.)

Certainly the board was not discriminating against any one or any sect but was offering the use of the auditorium to all religions and all sects upon the same terms, Mr. Box expressly stating that the board was not partial to any religion.

Under this section of his brief Petitioner states that Jehovah's Witnesses had the privilege to use the building and that an unequivocal duty rested upon the board to make the building available. This argument is facetious and cannot be seriously considered in view of the discretionary language of the statutes and the fact that Section 4839, O. G. C., says that the board *may* authorize the opening of the school house, may is certainly not a mandatory or unequivocable term as is contended by Petitioner.

CONCLUSION

From a review of the foregoing facts and authorities it is apparent first: this Court has no jurisdiction in this matter as it can be and has repeatedly been decided without involving any federal question; second: the decisions of the Ohio courts, interpreting the Ohio statutes, must be followed and are final; and lastly: to upset the decision of three Ohio courts involved means that this Court is trying the facts and is imposing its judgment upon the opinions, judgment and discretion of the board, which cannot be done when an entire absence of abuse of discretion appears. Therefore, Petitioners are not entitled to a *Writ of Certiorari* and their petition should be dismissed.

Respectfully submitted,

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Dated, July 26, 1950.